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Plaintiffs' Interim Co-Lead Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re Carrier IQ, Inc. Consumer Privacy
Litigation

No. 3:12-md-2330-EMC

**DECLARATION OF ROBERT F.
LOPEZ IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT,
PROVISIONAL CERTIFICATION OF
SETTLEMENT CLASS, AND
APPOINTMENT OF CLASS
REPRESENTATIVES AND CLASS
COUNSEL**

This Document Relates to:
ALL CASES

Date: February 16, 2016
Time: 2:00 p.m.
Place: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

1 I, Robert F. Lopez, declare as follows:

2 1. I am one of the lawyers representing plaintiffs Fischer, Kenny, Sandstrom,
3 Szulczewski, and Thomas in this matter. I also am a partner at Hagens Berman Sobol Shapiro LLP,
4 which this Court has appointed as interim-co lead counsel for plaintiffs and the proposed class in this
5 matter. I make this declaration based upon personal knowledge, and I am otherwise competent to be
6 a witness in this matter.

7 2. This matter concerns Carrier iQ Software, a product largely unknown before the
8 technical and mainstream press introduced the public to the work of Trevor Eckhart, an independent
9 security researcher, in and around November 2011. As the public would learn, Mr. Eckhart had
10 become interested in the functions of the Carrier iQ Software installed on his HTC mobile phone.
11 He published the results of his research in compelling web and video posts. These posts showed that
12 the software seemed to enable the interception and unauthorized re-transmittal of private electronic
13 communications and data to unintended recipients. Some 70-plus suits, in addition to congressional
14 interest, would follow. The first of those suits was filed in this judicial district by Patrick Kenny, one
15 of Hagens Berman's clients, and a named plaintiff in the instant matter.

16 3. Following consolidation in this honorable MDL Court of the suits filed nationwide in
17 this matter, and following the plaintiffs' filing of their First Consolidated Amended Complaint (Dkt.
18 No. 107) and other preliminary matters, the defendants—except for Motorola—filed their motion to
19 compel arbitration against all plaintiffs (save for Jennifer Patrick). (Dkt. No. 129.) By way of this
20 motion, the moving defendants sought to refer this matter to arbitration by invoking the plaintiffs'
21 arbitration agreements with their wireless service providers AT&T, Cricket, and Sprint.

22 4. Plaintiffs raised several defenses against this motion, including some (such as
23 unconscionability and scope defenses) that involved questions of fact. Accordingly, the Court
24 permitted certain arbitration-related discovery. Plaintiffs then served discovery requests on the
25 moving defendants, their wireless carriers, and Google Inc. The latter is the owner and publisher of
26 the Android OS, which powered all of the plaintiffs' mobile devices, and which, based on our
27 investigation, might have received certain transmittals of electronic communications from plaintiffs'
28

1 devices, unbeknownst to plaintiffs, in connection with the Carrier iQ software installed on those
2 devices. Discovery proceedings were contentious but productive.

3 5. More specifically, these discovery proceedings involved motions to compel before
4 Magistrate Judge Cousins and follow-up efforts, including a detail-oriented, in-person meeting in
5 San Francisco among counsel for all the Parties, designed to lessen the claimed undue burden on
6 defendants and third-parties. Ultimately, all targets, including Google, produced material (variously
7 documents, interrogatory answers, and declarations) to the plaintiffs, the total of which was
8 voluminous, and we and our interim co-lead counsel, Pearson, Simon & Warshaw, LLP, reviewed
9 and analyzed it with advice from our consultants and in conjunction with information and material
10 that our investigations had produced.

11 6. On April 28, 2014, defendants filed a notice of appeal with respect to the order
12 denying their motion to compel arbitration. (Dkt. No. 261.) Defendants then moved the Court for a
13 stay pending disposition of their appeal. Following briefing and a hearing, the Court on June 13,
14 2014 denied defendants' motion to stay without prejudice. (Dkt. No. 285.) In January 2015,
15 defendants-appellants filed an 80-page opening brief. Further briefing on their appeal has been
16 delayed by agreement of the parties pending the outcome of mediation and other settlement
17 negotiations, but the appeal remains pending.

18 7. As for the continuing proceedings in this Court, following denial of defendants'
19 motion to stay, all of them in July 2014 moved to dismiss plaintiffs' SCAC in its entirety. (Dkt. No.
20 304.) Briefing was completed in early September 2014, Dkt. Nos. 309 and 311, and a hearing was
21 held later that month. In January 2015, the Court issued its order granting in part and denying in part
22 defendants' motion. (*See generally* Dkt. No. 339 (MTD Order).) Thereafter, with the benefit of the
23 Court's initial rulings, the parties agreed to private mediation. In advance of mediation, the Court
24 permitted plaintiffs ADR-related discovery. Plaintiffs propounded written discovery to all
25 defendants, and plaintiffs' counsel reviewed and analyzed the detailed answers and materials,
26 including documents, that defendants produced.

27 8. In sum, during the pendency of this case, interim co-lead counsel have conferred with
28 consulting experts formally and informally; conducted extensive factual and legal research and

1 analysis; and reviewed and analyzed discovery answers and responses, and voluminous quantities of
2 documents, including those produced by the defendants and by non-parties Google, AT&T Mobility,
3 Cricket, and Sprint.

4 9. Additionally, we and our interim co-lead counsel requested, and defendant Carrier iQ
5 provided, information regarding Carrier iQ's financial condition and its ability to satisfy a judgment
6 in this case, as well as its ability to contribute funds to settle this matter. We and interim co-lead
7 counsel reviewed and analyzed the financial data provided by Carrier iQ as part of the process of
8 reaching the instant settlement. Naturally, it was important to consider whether Carrier iQ had the
9 ability to satisfy a judgment had litigation gone forward, and had plaintiffs been successful.

10 10. With respect to the private mediation to which they had agreed, the parties chose
11 JAMS mediation before the Hon. James Larson (U.S.M.J. Ret.). The first all-day mediation occurred
12 in San Francisco on November 12, 2014. Four more all-day sessions occurred in San Francisco on
13 December 16, 2014; March 17, 2015; April 27, 2015; and September 28, 2015. These sessions were
14 conducted with the aid of mediation briefing prepared by the parties, including briefing and analyses
15 submitted on behalf of the plaintiffs, which was prepared by interim co-lead counsel.

16 11. Each mediation session, several of which went well beyond eight hours, was
17 contentious. Both sides held their ground, with all parties strongly insisting on the righteousness of
18 their positions. The parties continued their negotiations following each session, sometimes with the
19 aid of Judge Larson.

20 12. Based on discovery and analysis, plaintiffs estimate the nationwide settlement class to
21 consist of some 79 million members.

22 13. Ultimately, the parties reached the settlement now before this Court. The settlement
23 provides, *inter alia*, for a gross settlement fund of \$9 million in monetary relief to the proposed
24 settlement class. Additionally, Carrier iQ agreed, prior to the acquisition of its assets by AT&T
25 Mobility IP, LLC, to provide certain injunctive relief to the proposed class. (*See* Ex. A hereto, ¶¶ 18-
26 21.) As part of the settlement agreement, Carrier iQ warrants that it performed as agreed prior to the
27 asset sale. (*Id.*, ¶¶ 18 and 67.b.)

1 14. Interim co-lead counsel, including lead trial attorneys Steve W. Berman and Bruce L.
2 Simon, in consultation with plaintiffs' executive committee members, all of whom are well-
3 experienced in class and consumer litigation, endorse the value of this hard-won and well-informed
4 settlement. So do all named plaintiffs.

5 15. As for the named plaintiffs, they variously have assisted counsel with the preparation
6 of complaints in this matter; have consulted with counsel at various times throughout the pendency
7 of this case; have monitored the proceedings on their own behalf and on behalf of the putative class;
8 and have worked with counsel to prepare, review, and submit declarations in support of their claims
9 and those of the proposed class. In addition, each worked with plaintiffs' counsel in preparing initial
10 disclosures. Various named plaintiffs also have consulted on more than one occasion with interim
11 co-lead counsel, with Executive Committee counsel, or with their own counsel (as requested by
12 interim co-lead counsel) regarding settlement efforts and the proposed terms of settlement. None of
13 the named plaintiffs, however, will receive anything more from this proposed settlement than any
14 other class member. Instead, he or she will only be entitled to the same relief, subject to the same
15 conditions, as any other class member. (But for their service on behalf of the proposed class, the
16 agreement provides that we may request service awards not to exceed \$5,000 for each named
17 plaintiff (and one former named plaintiff).)

18 16. As for plaintiffs' attorneys' fees, costs, and expenses, the parties addressed the
19 recovery of these following negotiation of the substantive terms of the proposed class settlement.
20 Regarding attorneys' fees specifically, the parties have agreed that proposed class counsel may
21 request (and distribute) the Ninth Circuit benchmark of 25% of the Net Settlement Fund by way of a
22 separate motion to be filed prior to the final approval hearing. (*See* Ex. A hereto, ¶ 37.) Of course,
23 this fee request will be subject to the approval of the Court.

24 17. The plaintiffs and proposed class in this matter were represented throughout by
25 dedicated counsel, including interim co-lead counsel led by Steve W. Berman and Bruce L. Simon,
26 and plaintiffs' executive committee members, all of whom have extensive experience in class-action
27 and commercial litigation. As our attached firm resume and biographies show, Hagens Berman and
28 its attorneys, led by Mr. Berman, have extensive experience and expertise in prosecuting complex

1 class cases, including commercial, consumer, and product liability actions. We remain committed to
2 advancing and protecting the common interests of all members of the class, and so we respectfully
3 submit our application for appointment as class counsel.

4 18. In this case, while certain evidence pointed in plaintiffs' view to violations of federal
5 and state wiretapping and privacy laws, violations of various states' consumer fraud laws, and
6 violation of the implied warranty of merchantability, plaintiffs' success was not without doubt. For
7 example, the plaintiffs faced another motion to dismiss following amendment of their complaint,
8 including as to their re-pled Federal Wiretap Act claim against the manufacturer defendants. Also,
9 almost certainly defendants would have moved to dismiss most if not all of the rest of the claims that
10 plaintiffs would have re-pled, too. The defendants would continue to have contested liability and
11 damages, and plaintiffs had to take into account the financial condition of defendant Carrier iQ.
12 Additionally, the defendants promised to contest class certification on grounds that plaintiffs
13 necessarily took seriously. Further, plaintiffs faced defendants' pending appeal to the Ninth Circuit,
14 which, if successful, could have resulted in all of their claims being referred to arbitration.

15 19. Still, at every stage of this case, plaintiffs pushed back on the strength of their
16 research, investigation, results of discovery, and conviction, reminding the defendants of the strength
17 of their own positions. But ultimately, after taking into account the risk expense, complexity, and
18 likely duration of further litigation, plaintiffs and their experienced counsel, with the aid and wisdom
19 of Judge Larson, were able to achieve a settlement that allows for substantial monetary and
20 injunctive relief to the settlement class.

21 20. Specifically with respect to the monetary component of the Settlement, \$9 million is
22 substantial in light of the above-stated risks, together with the risk that, ultimately, a jury could find
23 no liability or award no damages, or well less in damages, should the case have proceeded to trial.
24 There also was the matter of defendant Carrier iQ's financial condition. As for the non-monetary
25 relief achieved, it included significant alterations to the Carrier iQ Software, as well as changes to the
26 porting guide to help prevent a debug error such as that whose effects Trevor Eckhart pointed to in
27 his widely seen YouTube video.

21. Attached as Exhibit A is a true and correct copy of the Parties' Stipulation and Release, with its exhibits.

22. Attached as Exhibit B are true and correct website materials retrieved on January 22, 2016 regarding the three potential, proposed *cy pres* recipients in the parties' settlement agreement: the Electronic Frontier Foundation; the Center for Democracy and Technology; and the CyLab Usable Privacy and Security Laboratory at Carnegie Mellon University.

23. Attached as Exhibit C are copies of Hagens Berman's firm resume and biographies of Steve W. Berman and Robert F. Lopez, the Hagens Berman attorneys who did the most work on this matter for our firm.

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Executed this 22nd day of January, 2016 at Seattle, Washington.

/s/ Robert F. Lopez.
Robert F. Lopez